83-303

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ALEXANDER L. STEVAS,
CLERK

IN THE

UNITED STATES SUPREME COURT

CASE NO._____

ROBERT R. MANIATES

Appellant,

v.

CITY OF LYNCHBURG

and

THOMAS S. MARSHALL

Appellees.

APPEAL FROM THE SUPREME COURT OF VIRGINIA

STATEMENT OF JURISDICTION

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IN THE

UNITED STATES SUPREME COURT

ROBERT R. MANIATES,)

Appellant,)

v.) CASE NO. _____

CITY OF LYNCHBURG)

and)

THOMAS S. MARSHALL,)

Appellees.)

JURISDICTIONAL STATEMENT

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States and in support of his appeal to this honorable Court, the Appellant, Robert R. Maniates, submits the following:

A. QUESTIONS PRESENTED BY THE APPEAL.

Whether Virginia Code Section 58-1010 is unconstitutional whereby it allows the

tax collector to seize one's property in an ex parte proceeding upon the mere belief that taxes are owed without affording the taxpayer any type notice or hearing whatsoever, either prior or subsequent to placement of the tax lien and seizure of his property, at which time the taxpayer could contest the accuracy or validity of the lien?

B. A COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED MAY BE FOUND IN THE CAPTION CAPTION OF THIS CASE.

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D. THE OFFICIAL OPINIONS RENDERED BELOW.

The official opinions rendered below consist of the Lynchburg Circuit Court's Order dated August 2, 1982 and the Order of the Virginia Supreme Court dated June 7, 1983.

E. GROUNDS OF JURISDICTION.

This case arises from a final order of the Virginia Supreme Court entered June 7, 1983 refusing a petition for appeal from the August 2, 1982 Order of the Lynchburg Circuit Court upholding the constitutionality of Virginia Code Section 58-1010. A notice of appeal was filed with the Virginia Supreme Court on August 3, 1983. Jurisdiction for this appeal arises out of 28 U.S.C. Section 1257(2).

F. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED.

The Fifth Amendment to the United States Constitution provides, in part, that "no person shall be . . . deprived of . . . property, without due process of law."

Virginia Code Section 58-1010 provides that:

> Any person indebted to or having in his hands estate of a person assessed with taxes or levies may be applied to in writing by the officer for payment thereof out of such debt or estate and a payment by such person of such taxes or levies, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. From the time of the service by such officer of any such application, the taxes and levies shall constitute a lien on the debt so due from such person or on the estate in his hands. If the person applied to does not pay so much as may seem to the officer ought to be recovered on account of the debt or estate in his hands, the officer shall, if the for such taxes or levies does not exceed two thousand dollars, exclusive of penalties and interest, procure from a justice of the

peace or judge or clerk of a court not of record a summons directing such person to appear before the appropriate county court or municipal court, at such tme and place as may seem reasonable; and if the sum due exceeds two thousand dollars, shall procure from the clerk of the circuit court of the county or corporation court of the city a summons directing such person to appear before such court on the first day of the next term thereof; provided that in all cases returnable before a county court or municipal court, any person so summoned shall have a right, if the sum due for such taxes or levies exceeds the sum of three hundred dollars, exclusive of penalties and interest, to remove the case to a court having jurisdiciton of appeals from such county court of municipal court wherein the case was brought, and the procedure for and upon such removal shall be the same, mutatis mutandis, as is provided by Section 16.1-92. (Code 1919, Section 2444; 1928, p. 213; 1944, p.333; Tax Code, Section 382; 1960, c. 573.)

G. STATEMENT OF THE CASE.

The Appellant, Robert R. Maniates, (hereinafter referred to as "Maniates") was assessed for real estate taxes by the City

of Lynchburg (hereinafter referred to as the "City") for the year 1978. Maniates refused to pay these taxes as a matter of principle over a dispute with certain City policies. When these taxes were not paid, the City gratuitously sent via the mail a "Final Notice" to Maniates on or about July 30, 1979. This mailing was not required by statute and was not sent via registered or certified mail.

Approximately eight (8) months later on or about March 14, 1980, the City hand-delivered a Notice of Tax Lien to a local bank where Maniates maintained an account. The Notice stated that it placed a lien on "such estate of taxpayer . . . from the time of service of this notice." The tax lien was initiated pursuant to Virginia Code Section 58-1010. This collection statute applies to the collection of all

taxes. See copy of statute reprinted hereinabove. The City gratuitiously mailed Maniates a copy of the tax lien after placement of their lien. The mailing was not required by the Virginia statute. Receipt of the tax lien "froze" Maniates' funds. The bank paid his funds to the City. Both parties agreed in a Stipulated Statement of Facts that "Section 58-1010 does not require a hearing prior to the issuance of a lien under Section 58-1010 and payment of the levied funds owed to the City."

As a result of the ex parte seizure of his property, Maniates filed a Bill of Complaint in the Lynchburg Circuit Court asking for declaratory relief pursuant to 42 U.S.C. Section 1983 that Virginia Code Section 58-1010 be declared violative of Maniates due process rights by failing to

provide Maniates "some type of pre-lien or post-lien notice and hearing to contest the accuracy and/or validity of any lien placed upon the plaintiff's, or anyone else's property."

All evidence was stipulated by the parties. The trial Court entered an Order dated August 2, 1982 holding, in part, that "the collection procedures initiated by the Defendants pursuant to Section 58-1010 of the Code of Virginia, 1950, as amended, did not deprive the Plaintiff of due process of law . . ." See copy of Order attached hereto. The decision was appealed to the Virginia Supreme Court. By an Order dated June 7, 1983, the Virginia Supreme Court refused to review the appeal. A copy of that order is attached hereto.

H. STATEMENT OF SUBSTANTIALITY OF ISSUE PRESENTED.

In the Case at bar, Maniates' property was seized by a local tax collector for the payment of taxes alleged to be due. The collection statute in question did not require the tax collector to have personal knowledge of the taxes due, to verify these matters before a neutral official or to afford Maniates any type hearing either before or after seizure to give Maniates an opportunity to contest the accuracy of amount seized. The United States Supreme Court has repeatedly held that minimum standards of due process require some type hearing at a meaningful time before a nuetral officer before anyone is finally deprived of his property. A recent case in point is Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976). Mathews involved a procedural due process challenge to the federal government's method of

terminating social security disability payments. In reflecting upon the concept of procedural due process, the Court stressed:

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolf v. McDonnell, 418 U.S. 539, 557-558, 92 S.Ct. 2963, 2975-2976, 41 L.Ed. 2d 935 (1974). See e.g. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). See also Dent v. West Virginia, 129 U.S. 114-, 123-125, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889). The 'right to be heard before being condemned to sufer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 96 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62

(1965). See Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). 96 S.Ct. at 902. (emphasis added)

The Court in Mathews, supra, also went on to articulate three factors applicable in measuring a statute's compliance with due process.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail. Mathews v. Elridge, supra, 424 U.S. at 335, 96 S.Ct. at 903.

The requirement of some type hearing before a neutal official before one is finally deprived of his property likewise received considerable attention from this

Court in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975). There, the Court struck down a Georgia statute that allowed prejudgment garnishment conditioned upon the filing of an affidavit stating that the affiant feared a loss of monies in the main suit unless garnishment was issued and upon the posting of a double surety bond. Holding that this procedure did not meet minimum requirements of due process, the Court held:

> The Georgia garnishment statute has none of the saving characteristics of the Louisiana statute. The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. Section 46-103. The affidavit, like the one filed in this case, need contain only conclusory allegations. The writ is issuable, as this one was, by the court clerk, without participation by a judge. Upon service of the writ, the debtor is deprived of the use of

> the property in the hands of the garnishee. Here a sizeable bank account was frozen, and the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be. 95 S.Ct. 15 722-723.

In elaborating on his view of minimum due process requirements, Justice Powell's concurring opinion stated:

> In my view, procedural due process would be satisfied where state law requires that the garnishment be preceded by the garnishor's provision of adequate security and by his establishment before a neutral officer of a factual basis of the need to resort to the remedy as a means of preventing removal or dissipation of assets required to satisfy the claim. Due process further requires that the State afford an opportunity for a prompt postgarnishment judicial

> hearing in which the garnishor has the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt.
>
> * * *
>
> [Justice Powell concluded that the] most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing. Under Georgia law, garnishment is a separate proceeding between the garnishor and the garnishee. The debtor is not a party and can intervene only by filing a dissolution bond and substituting himself for the garnishee. 95 S.Ct. at 725. (emphasis added)

Even in the context of tax collections, this Court has recognized that these general principles of due process apply abd that some form notice and/or hearing are mandated by due process prior to final deprivation of one's property. A case in point is Commissioner of the Internal Revenue Service v. Shapiro, 424 U.S. 575,

96 S.Ct. 1062 (1976). Shapiro was a jeopardy assessment case wherein the tax collector argued that the taxpayer was seeking to evade payment of taxes by leaving the Country and therefore was entitled to no type post-seizure hearing. This Court vigorously disagreed and stressed that it:

> * * * has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made. Here, the Government seized respondent's property and contends that it has absolutely no obligation to prove that the seizure has any basis in fact no matter how severe or irreparable the injury to the taxpayer and no matter how inadequte his eventual remedy in the Tax Court. 96 S.Ct. at 1072. (emphasis added)

In a footnote, the Supreme Court went on to state that:

> We have often noted that, in resolving a claimed violation of procedural due process a careful weighing of the respective interests is required, Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed. 2d 725, 737 (1975); and we have noted that the Government's interest in collecting the revenues is an important one. Fuentes v. Shevin, 407 U.S. 67, 92, 92 S.Ct. 1983, 2000, 32 L.Ed. 2d 556, 557, (1972). This interest is clearly sufficient to justify seizure of a taxpayer's assets without a pre-seizure hearing. Fuentes v. Shevin, supra, and to remove any need to subject the Commissioner to the burden of an inquiry into the basis for his assessment absent factual allegations of irreparable injury by the taxpayer. Phillips v. Commissioner, 283 U.S. 589, 595, 597, 51 S.Ct. 608, 611, 75 L.Ed. 1289, 1296-1297 (1931). However, it is very doubtful that the need to collect the revenues is a sufficient reason to justify seizure causing irreparable injury without a prompt post-seizure inquiry of any kind into the Commissioner's basis for his claim. 96 S.Ct. at 1072, f.n. 12. (emphasis added).

Surely if a prompt post-seizure hearing is required for jeopardy collections when the tax collector believes the taxpayer is being dishonest and attempting to avoid payment of his taxes, due process requires at least as much protection for the honest taxpayer. A prompt post-seizure hearing is certainly compatible with the flexible standards required by due process. A prompt post-seizure hearing provides for a hearing at a "meaningful time and in a meaningful manner." Mathews, supra.

Returning to the three factors articulated in Mathews, supra, the private interest to be affected is great. No one should be deprived of his property mistakenly. Secondly, the risk of error is great. Murphey's law dictates that errors are a part of everyone's day-to-day activities - - a condition which the tax

collector is not immune. Finally, the administrative burden to afford the taxpayer a brief hearing after levy but before seizure is miniscule. The commonly stated rationale that collection of the taxes justifies summary procedures has no force once the tax collector has control of the assets. To afford the taxpayer a brief opportunity to set aside the seizure by demonstrating a mistake or inaccuracy is the minimum right to which all taxpayers are entitled. Weighing all these factors, it cannot be said that Virginia Code Section 58-1010 comports with due process.

In conclusion, it is respectfully submitted that the honest taxpayer is entitled to some type prompt, post-seizure hearing to demonstrate that a mistake, either as to the identity of the taxpayer or amount believed to be owed, has occurred. To be meaningful, such a hearing

must obviously occur before the taxpayer is finally deprived of his property. Since Virginia Code Section 58-1010 does not afford any right to a pre-seizure hearing or immediate post-seizure hearing, it clearly violates these well recognized principles of due process. That other judicial avenues may or may not exist to remedy the mistake at a later time is no answer to the mandates of due process. Without a right to at least a prompt post-seizure hearing, no subsequent right to seek a judicial determination is "meaningful", for it comes too late - - after the taxpayer has been finally deprived of his property. It is this type mistaken deprivation that due process seeks to minimize. The Virginia statute totally fails to accord the citizens of the State of Virginia their rights to procedural due process and it should be stricken on this basis.

For these reasons and others deemed appropriate by the Court, Maniates hereby moves the Court to grant his appeal and set this case down for oral argument.

I. NOT APPLICABLE

J. APPENDIX IS ATTACHED

The Appendix consists of:

1) The June 7, 1983 Order of the Virginia Supreme Court;

2) The August 2, 1982 order of the Lynchburg Circuit Court; and

3) Notice of Appeal filed by Appellant on August 3, 1983 with the Virginia Supreme Court.

ROBERT R. MANIATES

By Sidney H. Kirstein
Of Counsel

Sidney H. Kirstein
McRorie, Kirstein & McMahon
P. O. Box 8
Lynchburg, VA 24505
Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he mailed a true copy of the foregoing Appeal from the Supreme Court of Virginia, Statement of Jurisdiction, to Walter C. Erwin, III, Assistant City Attorney, at his last known address, P. O. Box 60, Lynchburg, VA 24505, by depositing the same in the regular manner in the United States mail, postage prepaid, at Lynchburg, Virginia on the 22nd day of August, 1983.

Sidney H. Kirstein

Sidney H. Kirstein

APPENDIX

VIRGINIA :

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND ON
Tuesday the 7th day of June, 1983

Robert R. Maniates, Appellant,

against Record No. 821934

City of Lynchburg, Appellee.

From the Circuit Court
of the City of Lynchburg

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the court is of opinion there is no reversible error in the judgment complained of. Accordingly, the court refuses the petition for appeal. Code Section 8.01-675.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

ROBERT R. MANIATES,	)	
Appellant,	)	
v.	)	ORDER
CITY OF LYNCHBURG and THOMAS S. MARSHALL	)	
Appellees.	)	

This cause came on the 30th day of June, 1982 to be heard upon the Plaintiff's Bill of Complaint; the Defendants' Answer thereto; the briefs submitted by the parties; the parties' written Stipulation of Facts; upon depositions submitted to the Court by the parties; and upon the Motion by the Defendants to dismiss the Plaintiff's Bill of Complaint, and was argued by counsel.

UPON CONSIDERATION WHEREOF, the Court being of the opinion that for the reasons and authorities cited in the Defendants'

brief and for the arguments and authorities submitted to the Court at the hearing of this case, the collection procedures initiated by the Defendants pursuant to Section 58-1010 of the Code of Virginia, 1950, as amended did not deprive the Plaintiff of due process of law; that the provisions of the Code of Virginia and common law afford taxpayers an opportunity for a judicial hearing concerning the assessment and collection of delinquent taxes and levies and affords such taxpayers substantial due process of law; that the Plaintiff did not avail himself of his opportunities for a judicial hearing or any other hearing; and being of the opinion that the Plaintiff is not entitled to any of the relief prayed for in his Bill of Complaint and doth sustain the Defendants' Motion, and doth

ADJUDGE, ORDER and DECREE that the Plaintiff's Bill of Complaint be and the same is hereby dismissed with prejudice and each aprty to this action shall bear their own costs in their behalf expended, to which ruling of the Court, the Plaintiff, by counsel, excepted.

And there being nothing further remaining to be done in this cause, it is ORDERED stricken from the docket.

ENTER: 8/2/83

/s/ Norman K. Moon
Judge

I ask for this:

Walter C. Erwin, III
William M. Phillips
City Attorney
Walter C. Erwin, III
Assistant City attorney
Counsel for Defendants,
City of Lynchburg and
Thomas S. Marshall

Seen and objected to:

Sidney H. Kirstein
Coumsel for Plaintiff

A Copy, Teste:
Juanita E. Shields,
Clerk
By:

Deputy Clerk

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

ROBERT R. MANIATES,	)	
Appellant,	)	
v.	)	Record No. 821934
CITY OF LYNCHBURG	)	
and	)	
THOMAS S. MARSHALL	)	
Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Robert R. Maniates, the appellant named above, hereby appeals to the Supreme Court of the United States from the final judgment of the Virginia Supreme Court denying a petition for appeal by order entered on June 7, 1983.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

i) Bill of Complaint filed in Lynchburg Circuit Court;

ii) Responses and Grounds of Defense of the Defendants, the City of Lynchburg, and Thomas S. Marshall;

iii) Stipulated Statement of Facts entered into between the parties before the Lynchburg Circuit Court on June 30, 1982;

iv) Final Order entered by Lynchburg Circuit Court on August 2, 1982;

v) Notice of Appeal from final order of Lynchburg Circuit Court served August 11, 1982;

vi) Brief in Opposition to Petition for Appeal filed on or about October 26, 1982;

vii) Brief in Opposition to Petition for Appeal filed on or about November 9, 1982; and

viii) Final Order of Virginia Supreme Court denying Petition on Appeal dated June 7, 1983.

The following question is presented by this appeal:

1. Whether Virginia Code Section 58-1010 is unconstitutional whereby it allows the local tax collector to seize property for payment of taxes believed to be due via an ex parte proceeding without affording the honest taxpayer any type pre-seizure or immediate, post-seizure notice or hearing so as to minimize the risk of substantively unfair or mistaken deprivations of one's property?

Sidney H. Kirstein
McRorie, Kirstein & McMahon
P. O. Box 8
Lynchburg, VA 24505

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he mailed a true copy of the foregoing Notice of Appeal to Walter C. Erwin, III, Assistant City Attorney, at his last known address, P. O. Box 60, Lynchburg, VA 24505, by depositing the same in the regular manner in the United States mail, postage prepaid, at Lynchburg, Virginia on the 3rd day of August, 1983.

_____
Sidney H. Kirstein

Received by the Supreme Court of Virginia on August 4, 1983.